

AMARAKOON AND OTHERS
v.
UNIVERSITY GRANTS COMMISSION AND OTHERS

COURT OF APPEAL
TILAKAWARDANE, J.
CA NO. 288/01
MARCH 25, 2002

Universities Act, No. 16 of 1978, sections 15 (iv), 39 and 147 – Allowance paid to teachers – Who is a teacher? – Academic support staff – Are they entitled to the allowance? – Writ of mandamus available only to enforce statutory duties and not to compel to do what is impossible.

The petitioners sought a writ of *mandamus* directing the respondents to pay them the academic allowance, that was being paid to the teachers. The petitioners were the academic support staff.

Held:

- (1) The academic support staff could not be considered on equal par with the academic staff; additionally they do not fall into the category of teachers as defined in the Universities Act, section 147.
- (2) The definition of teachers in section 147 is exhaustive since the definition of teacher is followed by the word "Means" – which restricts the meaning to the scope contained in the definition. If the word 'Includes' had been used, the definition can be extended.

Per Tilakawardane, J.

"The existing expenditure for the payment of the academic allowance is Rs. 191 million. Funds have to be obtained from the Consolidated Fund to pay the academic support staff. It is clear that there is no practical possibility of enforcing obedience. Even if a writ of *mandamus* were to be granted by court, it is clear that it would not be possible to make extra payments."

- (3) The issue of a writ of *mandamus* is a discretionary remedy and the court ought to exercise discretion and decline the issue of a writ of *mandamus* when it would be practically impossible to comply with the order."

APPLICATION for a writ of *mandamus*.

Cases referred to :

1. *Mowjood v. Pussadeniya* – (1987) 2 Sri LR 287 at 298.
2. *Samarasinghe v. De Mel* – (1982) 1 Sri LR 123 at 128.
3. *Mohamed Sahibu v. Ariyaratne* – (1985) 1 Sri LR 146 at 151.
4. *De Alwis v. De Silva* – 71 NLR 108.
5. *Weligama Multi Purpose Co-operative Society v. Chadradasa Daluwatte* – (1984) 1 Sri LR 195.

Faiz Musthapha, PC with *T. Machado* for petitioner.

M. R. Ameen, State Counsel, for respondents.

Cur. adv. vult.

December 07, 2002

SHIRANEE TILAKAWARDANE, J.

This application has been preferred by the petitioners who had sought⁰¹ a mandate in the nature of a writ of *mandamus* directing the 1st to 5th respondents to pay the 1st, 5th, 7th, 9th to 12th, 14th and 15th petitioners the academic allowance equivalent to 30% of their salaries with effect from 01. 01. 1997 and to pay the 2nd, 3rd, 4th, 6th, 8th, 13th, 16th and 17th petitioners the academic allowance equivalent to 30% of their salaries with effect from the petitioners' respective dates of appointment. This was based on the Circular No. 729 dated 04. 05. 1998, marked as P12 and the Circular No. 703 dated 04. 03. 1997 produced marked P7. The basis of the petitioners' application¹⁰ was that in view of the report of the Salaries Commission (P4), the failure to pay the allowance amounts to a breach of the legal duty cast upon the 1st respondent by section 15 (4) of the Universities Act, No. 16 of 1978: Counsel for petitioners has also stated that this allowance was also payable in terms of the order of the Supreme

Court in Application No. SC (F/R) 840/99. A perusal of the proceedings of this application shows that no order had been made to the effect as was submitted by the counsel for the petitioners. This application bearing No. SC (F/R) 840/99 was filed in the Supreme Court on 24. 09. 1999 alleging that the Circular No. 750 dated 27. 08. 1999, marked P14, denying the petitioners' other academic allowance was arbitrary, capricious and unreasonable and that the petitioners were treated in a discriminatory manner violating petitioners' fundamental rights to equality and equal protection of the law as guaranteed by Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka. The copies of the petition and affidavit filed by the petitioners in that case had been produced and marked as 1R2 (a) and 1R2 (b) and a copy of the objections filed by the 1st respondent has been marked as 1R2 (c). In this case a settlement to this matter had been suggested on 14. 02. 2000. On the basis of the proposed settlement, the Chairman of the 1st respondent Commission had written a letter dated 04. 05. 2000 marked as 1R3 (a) to the Secretary, Ministry of Finance and Planning. In this letter he had adverted to the fact that the "academic support staff" in the University system were not eligible to receive the academic allowance as this allowance was only paid to "teachers" as defined in the Universities Act, No. 16 of 1978 which did not include the academic support staff.

It is interesting to note that in that letter 1R3 (a) the Chairman of the 1st respondent Commission has set out, with reference to the Salaries Commission Report, that there was distinct categorization between "teachers" as defined in the Universities Act referred to above and the "academic support staff". This distinction had been considered in the report of the Salaries Commission, P4, where the recommendation had been for payment to be restricted only to "teachers" in the University system as defined in the Universities Act, No. 16 of 1978, who should be paid the academic allowance (*vide* page 71). This distinction was possible on a basis that for appointments to the two postings had distinctions that defined them into two categories. The "teachers" defined in the aforesaid Act had not only to undertake

teaching assignments but also had to carry out research and keep a record of their publications and such research conducted by them, which was an essential component for their promotions. Additionally, a First or a Second Class (Upper Division) in a special degree or a special degree with postgraduate qualifications (such as MA / MSc) were minimum qualifications for recruitment to the posts of teachers. Even *promotions* to the posts of Senior Lecturer, Associate Professor and Professor (in the category of teachers) required a specific and determined minimum of experience and also required a good record of research and to obtain postgraduate qualifications. It is in these circumstances that university teachers in special categories are justified in the payments of academic allowances specially in view of the objective that such staff would attend to the best of talent and would be sufficient incentive for them to remain in their positions. None of those apply to the academic support staff who were not required to undertake research and maintain a record of their research in order to obtain their promotions; nor was it mandated that they should have special qualifications. In these circumstances they could not be considered on equal par with the academic staff. Additionally, they do not fall into the category of "teachers" as defined in the Universities Act referred to above.

It is interesting to note that by 1R3 (a), which contains a reference to the details set out above, the Secretary to the Ministry of Finance and Planning sent a reply to the respondents by letter marked 1R3 (b) dated 15. 05. 2000 stating that he was not agreeable to pay an academic allowance even on a proportionate basis specially as the academic allowance that was recommended was payable only to the "teachers" as defined in the Universities Act, which should include only the academic staff. He further defined two categories describing the reason for higher standards of remuneration to be paid on the basis of higher qualification or superior performance which remuneration was not needed for the academic staff. He also reiterated the objectives of even the promotions in the category of academic staff which had been made in order not only to attract the best qualified in the

University but also to retain their services as Universities found it difficult to prevent the exodus of University teachers due to ample opportunities that are available to them in foreign universities. This afforded them better and more attractive remuneration and other perks and facilities. He also expressed the danger of making such payments as if it would extend beyond the definition of teachers in the Universities Act and it would also have to be extended to all those who provided necessary services to the students. The 4th respondent therefore did not agree to the payment of this allowance. 90

Counsel for petitioner argued that the 4th respondent had no powers to make a decision on this matter as a decision had already been made by the Chairman of the University Grants Commission, namely, the 1st respondent and that the only powers that the 4th respondent had were the administrative powers which mandated compliance with the directions of the Commission. In other words the petitioners' argument was that the payment of an academic allowance was a matter that was within the power of the 1st respondent Commission in terms of section 15 (iv) of the Universities Act and that obtaining the approval of the Ministry of Finance was merely an administrative requirement. His submission, therefore, is that the reply dated 15. 05. 2000 1R3 (b) sent by the Secretary of the Ministry of Finance and Planning was immaterial and irrelevant. However, the position of the 1st respondent Commission was that, if the Government failed to agree to its suggestion, it did not have the capacity to pay the petitioners an academic allowance and a careful perusal of section 15 (iv) of the Universities Act clearly demonstrates the requirements that the payments would be made within the overall wage and salary policies of the Government. Clearly, the ultimate payments come from Parliament. In terms of 1R4, the funds allocated by Parliament through the Government forms almost the entirety of the funds of the 1st respondent Commission. Therefore, the decision of the 1st respondent must necessarily have the concurrence and ratification of the Government through the 4th respondent. Clearly, therefore, in the circumstances in terms of section 15 (iv) of the Universities Act there 100 110

is no imposition of a legal^o duty on the 1st respondent to pay an academic allowance to the petitioners specially if it is found not to be within the overall wage and salary policies of the Government. 120 A writ of *mandamus* is available only for statutory duties. However, no statutory duty had been imposed on the 1st respondent to pay wage increases as the funds for such payment are not within the ambit of his powers but is vested with the 4th respondent subject to the overall wage and salary policies of the Government. Therefore, such payments must necessarily be made with the approval of the 4th respondent Ministry. In this case such approval has not been given, as is apparent from the letter of the 4th respondent dated 15. 05. 2000 marked as 1R3 (b). Clearly, the recommendation of the 1st respondent Commission for the increasing of the wages structure to 130 the teachers as defined in the Universities Act could not be extended to academic support staff in view of the disparity between the academic staff and the academic support staff, specially in view of disparity in their payments and promotions.

In any event taking the allowance beyond the restriction of "teachers" as defined in the Act, would eventually pave the way for other employees of the University also to claim this allowance. In any event as has been reiterated to do so would not be consistent or in accordance within the overall wages and salary policies of the Government. It is to be specifically noted that the funds for such 140 payment would necessarily have to come only from Parliament. This payment, therefore, ordered by the 1st respondent clearly cannot be categorised as a statutory duty as it is contingent on other factors.

In any event, it is significant that the petitioners had originally filed the aforesaid Supreme Court Application No. SC (F/R) 840/99 alleging infringement of fundamental rights and the case was settled on the basis that the Chairman of the 1st respondent Commission was to write a letter, which is dated 04. 05. 2000 marked 1R3 (a) to the Secretary, Ministry of Finance and Planning. It is evident from the proceedings of 16. 05. 2000 in the said application (P15) that the 150

Supreme Court had been informed on 16. 05. 2000 that the 1st respondent Commissioner had recommended the payment of an academic allowance to the 4th respondent, Secretary, Ministry of Finance and Planning by letter 1R3 (a). Consequently, the Supreme Court application had been dismissed on the application of the petitioner. Instead of having the action dismissed the petitioner should have awaited the outcome of the recommendation and if he had done so he would have become aware that the 4th respondent had not accepted the recommendation of the 1st respondent and this matter could have been listed for argument before the Supreme Court and an adjudication on this problem could have been finalized in that application. Instead of seeking a re-adjudication on this matter at the Supreme Court even by filing a motion setting out the sequence of events, he filed a new application in this Court. Furthermore, he had misled this Court in paragraph 28 of his petition by stating that there had been an order of the Supreme Court, which cast a duty on the 1st respondent Commission to pay the allowance in terms of the said order of the Supreme Court. This was not only incorrect but is also misleading. The application to the Supreme Court had been dismissed upon a settlement whereby the petitioner had agreed to the 1st respondent canvassing the payment of this allowance from the 4th respondent.

It is common ground that a Presidential Committee was appointed in 1995 in order to examine and analyze the problems affecting the University system and this committee was given powers to make recommendations in relation thereto. The recommendations of the said committee were referred to the Salaries Commission by the Government. The Salaries Commission considered these recommendations and other recommendations made by various groups and compiled a report marked P4. It is evident from the table 6.2 at page 69 and 6.3 at page 70 of the report of the Salaries Commission, specially at paragraph 6.23 of the said report that the Salaries Commission made a distinction between "academic staff" and the "academic support staff". The academic staff consisted of Senior Professors, Professors, Associate

Professors, Senior Lecturers Grade I, Senior Lecturers Grade II, Assistant Lecturers, etc., and the category of "academic support staff" included Senior Engineering Teaching Assistants, Engineering Teaching Assistants Grade I, Engineering Teaching Assistant Grade II and Instructor in English Grade I, etc. The Salary Commission at paragraph 6.24 of the page 70 of the report P4 recommends that an academic allowance equivalent to 30% of salary be paid to academic staff and that the said recommendation was stated in most specifically at page 71 of the said report where it was categorically stated that the academic allowance be paid to "teachers in the University system as defined in the Universities Act". The definition of teachers at section 147 of the said Act reads as follows:

"teacher" means a Professor, Associate Professor, Senior Lecturer, Lecturer and Assistant Lecturer, and the holder of any post declared by Ordinance to be a post, the holder of which is a teacher."

The report of the Salary Commission referred to above was placed before the Cabinet of Ministers by Her Excellency the President acting as the Minister of Finance and that it was approved by the Cabinet of Ministers on 06. 11. 1996. (*vide* 1R1 (a) (b) (c) referred into Cabinet Minutes of 06. 11. 1996 and 14. 11. 1996. Thereafter, the 1st respondent Commission informed Secretary, Ministry of Finance and Planning by circular dated 27. 02. 1997 that the Government had decided to implement a new salary scale with effect from 01. 01. 1997. Pursuant to this, the 1st respondent had issued a new circular bearing No. 703 dated 04. 03. 1997 implementing the aforesaid Government policy decision on salary scales and circulars dated 27. 02. 1997 and 04. 03. 1997 had been annexed to the petitioners' proceedings as P7.

In terms of paragraph 3.3 of the circular dated 27. 02. 1997 this allowance of 30% was only to be paid to the "teachers" as defined in the Universities Act. Clearly, the petitioners were not entitled to

the aforesaid allowance since the petitioners did not possess the prerequisite qualifications and did not perform the duties that were incumbent upon the holders of the post that can be defined to be inclusive within the meaning of "teachers" as specified in the aforesaid Act. 220

Counsel for petitioner has sought to extend the meaning of "teachers" as stated in the Universities Act to include academic support staff. However, as set out above the definition under the classifications specially with regard to their qualifications and prerequisites for their promotions are distinct and diverse.

In terms of section 39 of the Universities Act though teachers were admitted to include Librarian, Deputy Librarian and Assistant Librarian it specially excluded the academic support staff.

It is significant that the definition of "teachers" in section 147 is exhaustive since the definition for "teacher" is followed by the word "means", which restricts the meaning to the scope contained in the definition. In the alternative if the word "includes" for instance had been used, the definition can be extended to be the meaning of statutory and include the entire English definition of the word. The word "teacher" has been defined in section 147 of the Universities Act only to mean a Professor, Associate Professor, Senior Lecturer, Lecturer and Assistant Lecturer. Therefore, it cannot be extended to include the petitioners who are Engineering Assistants and Engineering Teaching Assistants who do not come within the purview of the definition of teachers as contained in section 147 of the Universities Act. It is clear that the Salaries Commission of 1995 in its report marked P5 intended to give an academic allowance only to those who fall within the aforesaid definition of teachers and as such excluded the petitioners who are from the academic support staff. The definition between the two categories has been carefully analyzed and need not be reiterated. 230
240

Another matter that was submitted to the consideration of this court was that the interpretation of the word "teachers" should be given a contextual interpretation. However, he has not explained why such an interpretation can be given specially in the light of the report of the Salaries Commission P4 which has made a distinction between academic support staff and the academic staff. Specially, as in terms of paragraph 6.8 at page 65 of the report of the said Salaries Commission, the payment of an academic allowance was recommended on the basis of high performance level referred to earlier and other performances in the form of postgraduate qualifications, research and publications. Furthermore, there was a need to place such academics at a higher salary level within the Universities system in order to attract and retain high quality. These criteria would not be applicable to the petitioners as in terms of letters marked 1R3 (a) and 1R3 (b). It is clear that they are not required to have a "First" or "Second" (Upper) Class at the point of recruitment and neither were they required to undertake research nor was a record of research an essential requirement for their promotions. Furthermore, there was no difficulty in making recruitment to academic support staff to which the petitioners belonged and they were remunerated at a compared basis and other similar grades in the public sector including Corporations and Statutory Boards (1R3 (a) and 1R3 (b)).

In the circumstances, specially in the context of the Salaries Commission of 1995 in its report of P4, that had made a distinct classification between academic staff and academic support staff and recommended the enhanced structure wages to only those who fall within the definition of "teachers" as defined in section 147 of the Universities Act, the petitioners' claim for such academic allowance was not tenable in law.

In the cases of *Mowjood v. Pussedeniya*,⁽¹⁾ *Samarasinghe v. De Mel*,⁽²⁾ *Mohamed Sahibu v. Ariyaratne*⁽³⁾ it was held that the issue of a writ of *mandamus* is a discretionary remedy and that court ought to exercise discretion and decline the issue of a writ of *mandamus*

when it would be practically impossible to comply with the order as it is evident from column No. 4 in Annex No. II to "1R4" in the summary that the existing expenditure for the payment of the academic allowance per annum is Rs. 191 million. In this regard an examination of the letter marked 1R4 dated 03. 06. 1999 written by the Chairman of the 1st respondent Commission to the Director-General, Department of General Treasury reflects the funds and the amount that has to be obtained from the Consolidated Fund to meet the expenses. It is clear in terms of letter 1R3 (a) that there was no practical possibility of enforcing obedience. Even if a writ of *mandamus* were to be granted by this court it is clear that it would not be possible to make extra payments. *Mandamus* will not operate to compel the respondents to do what is impossible in law and in fact and in all the circumstances set out above this court finds that in any event in terms of section 15 (iv) of the Universities Act, it does not appear to be possible to impose a legal duty on the 1st respondent to pay an academic allowance to the petitioners since it would not be within the "overall wage and salary policies of the Government", since a writ of *mandamus* is available only for the enforcement of statutory duties (*De Alwis v. De Silva*;⁽⁴⁾ *Weligama Multi Purpose Co-operative Society Ltd v. Chandradasa Daluwatta*.⁽⁵⁾) Therefore, this application is dismissed with costs.

Application dismissed.